No. 14,563

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG BING NUNG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF JURISDICTION.

The indictment filed January 6, 1954 in the United States District Court for the Northern District of California, Southern Division charged a violation of 18 U.S.C.A., Section 545, smuggling, committed within the jurisdiction of this Court. (T. 2.) Trial was by the Court, a jury being waived. (T. 5.) Motion to acquit was denied July 1, 1954. (T. 8.) Defendant was sentenced September 14, 1954 to one year in the County Jail, which sentence was suspended, probation granted for two years and he was fined $250.00. (T. 14.) Notice of appeal was filed September 15, 1954. (T. 15.) The appeal was timely (Rule 37(a) Rules of Criminal Procedure). Ju-

risdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C.A., Sections 1291, 1294.

STATEMENT OF THE CASE.

Title 18 U.S.C.A., Section 545 provides:

> "Whoever knowingly and wilfully with intent to defraud the United States smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced . . . shall be fined not more than $5,000 or imprisoned not more than two years or both."

The indictment charged:

> "That Wong Bing Nung on or about the 15th day of December, 1953, at the City and County of San Francisco, State and Northern District of California, did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, merchandise which should have been invoiced, to-wit, 6 boxes containing an assortment of pills, capsules, syrups, powders, cigarettes, ointments, poultices, oils and foodstuffs."

The facts are simple. Defendant had been a seaman on board the SS President Cleveland for two years. (Rep. Tr. 79.) The ship docked in San Francisco December 15, 1953.

The witness Dong Dock Leong was in the habit of doing favors for the crew because Dong knew English, could read and write it and others includ-

ing defendant, could not. (Rep. Tr. 80.) At the request of defendant, Dong wrote a declaration for certain merchandise described therein. (Exhibit No. 7, Rep. Tr. 48, 73.)

The merchandise described in the declaration was, after duty paid, taken ashore that day.

On the morning of the next day, the 16th, defendant signed on as a crew member for the return trip to China. (Rep. Tr. 82, 83.) He was arrested that night. (Rep. Tr. 7.)

Exhibit I in evidence is six cartons or boxes of merchandise (Rep. Tr. 12) containing the merchandise (Rep. Tr. 16) described in the indictment. This merchandise was seized on the vessel in defendant's room by Customs officials, two boxes being in an adjoining room. (Rep. Tr. 11.)

Defendant asked witness Dong to ascertain from the Customs agents if he, defendant, could land that merchandise. (Rep. Tr. 76, 77, 82.) Dong asked Marshall, a customs man and he told Dong it could not be done. Dong said that if defendant could not land the goods he would take them back to Manila. (Rep. Tr. 76, 77, 82.) There was no attempt at bribery or wrong doing. (Rep. Tr. 77, 78.)

The Customs officials were advised of the presence of the merchandise on board ship and actually saw it. The merchandise was examined by Kahler, Customs agent of San Francisco and Blonder, his assistant, in defendant's room on board ship. Marshall, the other agent was told the merchandise was in

Wong Bing Nung's room. None of it was concealed. (Rep. Tr. 84, 85.)

The merchandise was admittedly owned by defendant and in his possession on board ship. Kahler admitted that while in his testimony he stated that defendant tried to get Dong to "fix" Marshall, that the word "fix" did not carry the connotation of something crooked. (Rep. Tr. 65.)

Much testimony was introduced about merchandise found in an automobile belonging to defendant. Implications of guilt were sought to be drawn from this testimony (Rep. Tr. 33, 40 to 44, 48, line 12 to 53, 60, 61) particularly in view of the way the merchandise was found under the sweaters. (Rep. Tr. 107, lines 1 to 4; 108, line 1.) While we believe it was gross error to admit this testimony such error was as far as the United States Attorney could do so, cured to a degree. (Rep. Tr. 50, line 18 to 52, line 9.)

Further the United States Attorney stated. (Rep. Tr. 109, line 23 to 110, line 5.)

> "Mr. Riordan. The Government at this time makes no claim that the United States Exhibit No. 2 is within the terms of the indictment, what was found in his car, we have no claim to.
>
> Our only claim is that United States Exhibit No. 1 was not declared and that is where the gravamen of the offense lies. Nothing whatsoever to do with No. 2.
>
> We only used that as circumstantial evidence, that some of it was taken off, the other was not declared."

The defendant knows little English. (Rep. Tr. 90.) Testimony of witness Kahler:

"Mr. Ringole. Q. You knew that this man didn't talk very good English?

A. He speaks enough.

* * * * * * *

Q. No, he talks very little English, isn't that true?

* * * * * * *

A. He holds an automobile driver's license, he has got a car registered to him.

* * * * * * *

Q. . . . But you know he doesn't speak fluent English.

A. He spoke English to me.

Q. Yes, surely he did. You know he didn't speak fluently?

A. I don't know.

Q. Well, let us be fair about it.

A. I don't know.

Q. Oh, Mr. Kahler, let's be fair. You know that he doesn't speak fluent English.

A. He answered my questions in English, if I can put it that way.

* * * * * * *

The Court. How long did you question him?

The Witness. Just briefly, your Honor, because he kept saying continuously, 'No savvy, no savvy,' which is common among these people.

* * * * * * *

Mr. Riordan. Q. What do the words 'No savvy' mean?

A. Well, it is pidgin English; I don't know."

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in denying appellant's motion to acquit. (Trans of Rec. Vol. I, 8.)

2. The District Court erred in finding the defendant guilty of the crime charged in the indictment. (Trans of Rec. Vol. I, 2.)

3. The District Court erred in finding that defendant intended to defraud the Government of the United States by moving the property into this country without the payment of customs duty as required by law.

4. The District Court erred in finding that defendant sought to move the property by clandestine means into the United States.

5. The District Court erred in finding that the intention of the defendant and his conduct constituted a violation of 18 U.S.C.A., Section 545.

6. The District Court erred in finding defendant guilty and in denying defendant's motion for judgment of acquittal.

ARGUMENT.

1. THE JUDGMENT SHOULD BE REVERSED BECAUSE CLANDESTINE IMPORTATION CONCERNING WHICH THERE IS NO EVIDENCE, IS OF THE VERY MARROW OF THE OFFENSE.

United States v. Thomas, 28 Fed. Cas. 76 No. 16473, 4 Ben. 370;

United States v. Keck, 172 U.S. 434, 43 L.Ed. 505;

United States v. Ritterman, 273 U.S. 261, 71 L.Ed. 636;

United States v. McGill, 28 Fed. 2d 572 (Ninth Circuit);
United States v. One Pearl Chain, 139 Fed. 513;
The Przemysl, 23 Fed. 2d 336.

The case was tried on the first paragraph of 18 U.S.C.A., Section 545 (Rep. Tr. 36) the indictment being laid under that paragraph. Despite a great deal of the testimony importation "contrary to law" denounced in the second paragraph of the section is not for consideration. See *Keck* supra, page 437 where the first count under a like statute was dismissed for insufficiency. Here, defendant was not charged at all. (Rep. Tr. 109, line 23, 110.) Exhibit I described in the indictment consisting of six boxes or cartons was at all times in the defendant's room and a room adjacent, in full view of five other crew members who lived there. Nothing was hidden. Customs officials were not only advised of its presence but actually saw and examined the merchandise involved. Full and complete disclosure was made to Customs. (Rep. Tr. 11.)

Witness Dong at the instance of defendant made the utterly foolish request of the Customs officials that he be permitted to land this merchandise. Admittedly there was no wrong doing in the request. (Rep. Tr. 65, 77, 78.) The Customs officials seized the merchandise on the ship itself just as in *Keck* supra, the diamonds were seized by Customs on the ship itself, as in *One Pearl Chain* supra, the chain was seized upon the ship and in all these cases

brought through the Customs lines by Customs officials themselves. Everything done by defendant with reference to the merchandise was open and above board. Everything done negatives smuggling and clandestine introduction. The case is stronger for defendant than any of the cases cited. In *Keck* there was plot and concealment; *Ritterman,* untruths and concealment. There was not the slightest concealment or misrepresentation by defendant. He did not deny ownership. (Rep. Tr. 88.) How could he? He had already sent Dong to see Marshall. Kahler's testimony above quoted practically admits that defendant did not know enough English intelligently to answer him. Despite broad experience with Chinese, only Kahler did not know that "no savvy" means "I do not understand you"!

Thomas supra, considered an earlier statute of like import as Section 545. The Court states that the statute

> "makes the clandestine introduction or smuggling into the United States of dutiable goods in cases therein provided for, a criminal offense which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation with the intent to defraud the revenue and not the nonpayment of . . . the duties prior to the importation which constitutes the gist of the offense."

Keck, holds that there is no such crime as an attempt to smuggle. (Page 509.) Of the statute it says that,

"Whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense." . . .

(Page 510):

. . . 'it follows that mere acts of concealment of merchandise on entering the waters of the United States however preparatory that may be and however cogently that may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. Quoting Russel on Crimes the Court said

"smuggling consists in bringing on shore or carrying from the shore, goods, wares or merchandise for which the duty has not been paid.'

Quoting from Bacon it states,

'As the offense of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore . . . a person may be guilty of divers practices, which have a direct tendency thereto, without being guilty of any offense.' "

Referring to English statutes the Court said (page 510):

"that the word 'smuggling' and 'clandestine introduction' so far at least as respected the introduction of dutiable goods from without the Kingdom, signified the bringing of the goods on land, without authority of law, in order to evade the pay-

ment of duty, thus illegally crossing the line of the Customs authorities."

In *One Pearl Chain,* pages 516-517 the Court states:

"but how can she be said to have 'clandestinely' introduced it when, before bringing it ashore she gave to the Customs officials a written declaration, which in effect said to them, 'I have in my baggage and on my person wearing apparel (including jewelry) which I have purchased abroad.' "

Paraphrasing that statement defendant stated to the Customs officials, "I have in my room six boxes of merchandise which I purchased abroad." Wherein is the clandestine introduction?

Reference is made to *McGill* supra, a decision of this circuit quoting with approval *Keck* and *Ritterman* and holding that the mere importation of liquor within the three mile limit was not smuggling.

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2. THE JUDGMENT SHOULD BE REVERSED BECAUSE THERE WAS NOT THE SLIGHTEST INTENT TO DEFRAUD THE UNITED STATES.

The statute specifically provides that the smuggling must be "with intent to defraud the United States." (18 U.S.C.A., Section 545.) The statute interprets itself.

United States v. Kushner, 135 Fed. 2d 668.

(Page 671):

"The question is not free from doubt but we incline to the view that intent to deprive the

> government of revenue must be held to be an ingredient of the crime defined in Section 1593A."

The statute there required an intent to defraud the *revenue* of the United States.

The Przemysl, 23 Fed. 2d 336. At page 340 the Court said:

> "These same authorities recognize that the terms 'smuggling' or the 'importation of and the introduction of foreign goods' into the country, must be considered with reference to the place at which, the circumstances under which, and the intention with which, the goods were found at the time of seizure; *the general test being whether or not there is an intent to defraud the revenue."* (Italics supplied.)

Here there was not only no intent to defraud the government but the express intent of defendant was not to land the goods here if his foolish request was refused, but to take them back to Manila.

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3. THE JUDGMENT SHOULD BE REVERSED BECAUSE DEFENDANT VIOLATED NO DUTY TO THE UNITED STATES.

Defendant is a seaman or crew member. On the morning of December 16, 1953 the day after the SS President Cleveland arrived in San Francisco he signed on for the return trip to China. Being unable to land his merchandise without payment of duty he decided to take it back to Manila. He declared part of the things he had purchased abroad, paid the duty and took them off the ship. He left all of

Exhibit I in his room. Witness Dong told Customs officials that if defendant could not land the merchandise as requested, he would take the merchandise back to Manila. This he had a perfect right to do. He had up to that period not imported the merchandise.

Title 19, Section 8.1, Code of Federal Regulations, page 158, provides:

> "Liability of Importer for Duties. Unless otherwise specially provided for by law, duties accrue upon imported merchandise on arrival of the importing vessel within a customs port *with intent then and there to unlade* . . ." (Italics supplied.)

Exhibit I constituted herbs, vitamins, dried meats and liquors. They were merchandise and not baggage and defendant to that extent was an importer. He was not liable for payment of duties because he did not have the intent *then and there to unlade* since he only intended to unlade if his foolish proposition was accepted. In any event there is no evidence that he intended to unlade in San Francisco. He was not under any duty whatever to declare them.

Title 19, Section 23.4, page 431 CFR, provides inter alia:

> "(b) Articles taken ashore by an officer or seaman permanently leaving his vessel without intention to re-ship shall be cleared through customs on the vessel or at the customs office on the pier and any duty found due shall be collected as in the case of an arriving passenger. (See Section 10.22 of this chapter.)"

Title 19, Section 10.22 page 219 CFR is by its terms wholly inapplicable to a seaman who re-ships and provides that the declaration by a crew member shall be made (Form 5123).

> "(b) at the port where the officer or crew member intends to land the articles."

Defendant had re-shipped. He was not permanently leaving the ship. The regulations are not applicable to him.

On the matter of the manifest it is provided (Title 19, Section 4.8, page 94 CFR):

> "(e.) All articles on board the vessel acquired by officers and members of the crew, . . . shall be specified in the *list of sea stores* in the following form: (Italics supplied) Upon delivery to customs of this list of articles acquired abroad by officers and members of the crew, the master of the vessel shall have shown thereon opposite the name of each officer and crew member *who intends to land articles at that port* for which written declaration and entry are required . . ." (Italics supplied.)

Thus it appears first, that it is not the duty of defendant to place anything upon the manifest, second that it is the duty of the master to list the purchases upon the "List of Sea Stores" and, third that this is only necessary in cases where the crew member intends to land articles at the port. The evidence is silent as to the intention of this defendant to land merchandise here. On the contrary the evidence shows that he intended not to land it here.

Under these regulations and because he had re-shipped on the same vessel, he is in the position of a passenger going from Hong Kong to his home in London by way of San Francisco who carries with him merchandise purchased in Hong Kong. He arrives in San Francisco, he declares some articles, pays duty, and gives them to friends here. He returns to the ship and proceeds to London. Is he smuggling? Are the Customs officials authorized to seize the merchandise in his room? There is not a single regulation directed to the crew member who re-ships, as far as research of this counsel discloses. The above quoted regulations refer to crew members who do not re-ship. The defendant therefore was perfectly at liberty to take his goods back to Manila or to any other port where the ship stops, without interference from Customs. There is no regulation that counsel can find that compels him to make declaration, pay duty or unlade in San Francisco.

All concerned at the trial including this counsel were technically mistaken when they stated that Exhibit I was not in the manifest but was in the "Crew's Purchase List". (TR 45, 46.) The above quoted regulation establishes a "List of Sea Stores" not a "Crew Purchase List". The regulation further makes the "List of Sea Stores" a part of the manifest. The oath of the master therefore on the "Preliminary Entry of Vessel" correctly refers to all attached documents as the "manifest".

On page 87 thereof there is listed four cartons of cigarettes a part of Exhibit I and described in the

indictment, the balance of the exhibit being omitted unquestionably by someone's error. However the errors are all inconsequential for whether "Manifested" or "Invoiced" or not, the goods could have been the subject of smuggling.

CONCLUSION.

It will be noted that Customs officials took everything this man had and for the time being pauperized him. (Vol. 1, TR pages 12, 16.)

Pity it is that when they realized how ignorant he is after he had made his extraordinary suggestion that they did not explain to him his rights and advise him what he should or could do. Possibly they felt that an arrest for an asserted violation of law is more in the public interest than education to avoid violation. Possibly this is another example of "man's inhumanity to man". Possibly the spirit of the arrest is found in the phrase, "He hasn't a Chinaman's chance."

We submit the judgment should be reversed.

Dated, San Francisco, California,
November 24, 1954.

Respectfully submitted,
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